Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-219

STATE OF MISSOURI, ex rel. UTILITY CONSUMERS COUNCIL OF MISSOURI, INC.,
Petitioner-Relator,

v.

PUBLIC SERVICE COMMISSION OF MISSOURI and UNION ELECTRIC COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the Missouri Court of Appeals, St. Louis District

BRIEF FOR RESPONDENT

Union Electric Company in Opposition to the Petition

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JURISDICTION

On page 2 of its petition for certiorari, the Utility Consumers Council of Missouri (UCCM) says that "The jurisdiction of this Court is invoked under 28 U.S.C.A. Sec. 1254(1)." However, that section applies only to the review of decisions of the United

States Courts of Appeals. Final judgments rendered by the highest court of a State in which a decision could be had may be reviewed only pursuant to 28 U.S.C.A. Sec. 1257.

While this latter section provides for review by appeal or certiorari, dependent upon the circumstances, it would appear that certiorari is the only possibility here. The quite general statutory provisions (28 U.S.C. Sec. 1257(3)) are clarified by subparagraph 1(a) of this Court's Rule 19, which says:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> (a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

QUESTION PRESENTED

The question presented by UCCM (page 2 of petition) was in fact decided by the Missouri Court of Appeals in accordance with UCCM's contention. Thus UCCM questions whether federal preemption precluded the Missouri Commission "from assessing the costs associated with the unique risks of nuclear power when comparing the costs of nuclear and fossil-fired electric generating plants." In holding that it did not, the Missouri Court of Appeals said:

> "The evidence indicated that the economic impact of the risk of a possible nuclear accident was insignificant. And, appellant admitted that any prediction of the cost of a possible nuclear accident was purely speculative, and the testimony showed that no data existed to predict such a cost.
>
> . . .
>
> "The federal government regulates *how* nuclear power plants will be constructed and maintained; the State of Missouri regulates *whether* they will be constructed. The federal regulations pertain to plans, specifications, safety mechanisms and the like. The Commission's considerations pertain to economic feasibility, need for increased power and financing. . . ."
>
> (*State ex rel. Utility Consumers Council of Missouri v. Public Service Commission of Missouri and Union Electric Company*, (Missouri Court of Appeals, St. Louis District, 1978), 562 SW(2) 688, at p. 698; and pp. 19a and 20a of Appendix C to the petition for certiorari.)

Also it should be noted that the Missouri Court of Appeals affirmed the decision of the lower court, which said:

> "UCCM also recognized that the Federal Government had pre-empted safety consideration of nuclear plants insofar as public health is concerned. However, they contended that the Missouri Commission must consider the safety question from the standpoint of determining whether the risks associated with the plant are so great as to make its construction economically inadvisable. The Court agrees with UCCM. . . ."
>
> . . .
>
> "Turning now to relator's contention that an economic appraisal of the nuclear risk should be made, it is quite obvious that the economic impact is insignificant. Such was the finding of the Public Service Commission. This is borne out by the finding in the Rasmussen Report at p. 198 that 'reactor accidents have a negligible impact on the total risk of economic loss from man's activities and from natural events.' The Commission properly determined

that the economic impact of the safety question was insignificant and that construction of the plant was necessary to provide sufficient electric supply for anticipated demand."

(pages 30a and 32a of Appendix D to the petition for certiorari)

STATEMENT

At the outset of its statement (p. 3), UCCM refers to the testimony of Dr. Henry W. Kendall before the Missouri Commission, and it includes a portion of his testimony in Appendix F to its petition. The only possible reason, which we can imagine, for such reference is the requirement in Rule 23.1(f) of this Court that a petition for certiorari from a state court judgment must detail the manner and method of raising the federal question. But the testimony of Dr. Kendall has no relation to the federal question UCCM purports to present. The contention was made in his testimony that the question of *safety* to the public health and welfare had been preempted by the Federal Government. But UCCM does not question that contention. Rather its claim in this Court is that the Missouri Court erroneously held that the question of an economic appraisal of the risks of nuclear reactors had been preempted by federal authority. But as we have previously stated, the Missouri Court did not so hold. In fact its holding was directly to the contrary.

The remainder of the UCCM statement is largely a recital of the progress of this case through the Missouri administrative agency and Missouri Courts. But apparently petitioner cannot resist the temptation to again state, incorrectly and improperly, (p. 4 of petition) that the Missouri Court of Appeals failed to reach the economic question "because it erroneously concluded it was preempted by federal law."

REASON FOR DENYING THE PETITION

The UCCM appears to raise some question about the decision of the United States Court of Appeals (8th Circuit) and this Court in *Northern States Power Co. v. Minnesota,* 447 F(2) 1143 (8th Cir., 1971), aff'd. 405 U.S. 1035 (1972) (mem.) But we do not understand this action to be intended as a basis for the certiorari petition. Rather the discussion seems intended to create an occasion for UCCM to repeat again its erroneous claim that the Missouri Court held that economic matters have been preempted by the federal government.

Toward the end of page 5 of its petiton UCCM slips away from costs associated with the ***unique risks*** of nuclear power and enters the field of nuclear reliability and capacity factors. Since nuclear power plants have been around for some time, there has been a great deal of experience on these matters and there was a great deal of evidence in the instant case, and a number of findings, about them (pp. 3a, 15a, 16a, 24a, 29a, 33a, 41a, 48a, 60a and 63a of Appendices to petition).

The UCCM continues its petition with its repetitive and unfounded claim. For instance, on page 7 it says "the Commission and the Missouri Court of Appeals misinterpreted the *Northern States Power* case by finding that the Commission was not to assess the costs associated with the unique risks of nuclear power", and on page 8 it says "To straighten out the Missouri Court of Appeals erroneous application of the law as settled by this Court, the Court should review this case". We repeat once more that the Missouri Court of Appeals clearly and squarely held that the question of costs associated with the risks of nuclear power, unique and otherwise, have not been preempted by the federal government.

On pages 9 through 12 of its petition UCCM cites a number of decisions of Courts and Commissions in other states. Those

decisions are not before this Court and are not the subject of this petition. Consequently they have no relevance here.

On page 12 UCCM makes a rather mystifying argument stemming from the separation of the former functions of the Atomic Energy Commission between the Energy Research and Development Administration and the Nuclear Regulatory Commission. 42 U.S.C. Sec. 5801 et seq. We really cannot see how these UCCM statements are relevant to this petition.

Finally, on page 14 of its petition, UCCM admits that the Missouri Court's decision might be thought ambiguous. We certainly do not think so, but in any event a possible ambiguity does not constitute a basis for certiorari.

CONCLUSION

For the reasons set forth above the Petition for Certiorari should be denied.

Respectfully submitted,

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